PUBLIC BANK BERHAD

v.

BERJAYA HOUSING DEVELOPMENT SDN BHD. & ORS.

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD. HISHAMUDIN BIN MOHD. YUNUS JC
[CIVIL SUIT NO. 23-128-88]
12 JULY 1994

PRACTICE & PROCEDURE: *Preliminary objection by defendants' Counsel on defective affidavits - Non-compliance with O. 14 r. 2 (Form 18) of Rules of the High Court 1980 - Plaintiff's affidavit did not state deponent has personal knowledge of the matter - Source of information and deponents address not stated - Affidavit-in-reply to plaintiff's affidavits filed by defendants -Preliminary objection raised on date of hearing application for summary judgment -Whether defendants by their conduct waived right to object to defects in plaintiff's affidavit - Notice of intention to object not given to opponent - Effect.*

At the commencement of the hearing of the plaintiff's application for summary judgment under O. 14 of RHC 1980, defendants' Counsel raised a preliminary objection to the plaintiff's affidavits. He contended that the affidavits were not in compliance with O. 14 r. 2 and Form 18 of the RHC 1980 and were therefore defective. Consequently, he submitted that the Court ought to dismiss the said application for summary judgment.

Held:
The defendants by their conduct, had waived their right to object to the defects in the plaintiff's affidavit. The defendants, in opposing the O. 14 application have filed two affidavits and none of the affidavits contained the grounds of the preliminary objection raised by the defendants. Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent.

[Preliminary objection dismissed]

Cases referred to:
Jasabena Sdn Bhd v. Beh Heng Foo & Anor [1985] 1 MLJ 394 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O.14 r.2

For the plaintiff - Lim Soo Lee;M/s Jin-Nge & Co.
For the 1st, 2nd, 3rd, 4th, 6th & 7th defendants - Kanesan;M/s Chen, Leong & Co.

JUDGMENT

Mohd. Hishamuddin bin Mohd. Yunus JC:
At the commencement of the hearing of this O.14 application, the learned Counsel for the defendants made a preliminary objection. He objected to the plaintiff's affidavits as set out in enclosures 7, 14, 15 and 43. He contended that these affidavits were not in compliance with O.14 r.2 and Form No. 18 of the Rules of the High Court and were therefore defective. And since these affidavits were defective, therefore, this Court ought to dismiss this application for summary judgment.

Order 14 r. 2 states:

Manner in which application under Rule 1 must be made:

[Order 14]2 (1) An application under rule 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence except as to the amount of any damages claimed.

(2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

(3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day.

Form No. 18 is as follows:

No. 18
Affidavit On Application Under Order 14 rule 2, By Or On Behalf Of Plaintiff

I, ... of ..... (the abovenamed plaintiff, or solicitor for the abovenamed plaintiff, or clerk to the plaintiff's solicitor, or clerk to the plaintiff, or as the case may be) do make oath (or affirm) and say as follows:

1. The defendant ..... is, and was at the commencement of this action, justly and truly indebted to (me, or the abovenamed plaintiff) in the sum of $..... for the ..... The particulars of the said claim appear by the endorsement on the writ of summons in this action.

2. It is within my own knowledge that the said debt was incurred and still is due and owing as aforesaid.

or

(2) I am informed by (state source of information) and/or I verily believe (state grounds of believe) that the said debt was incurred and is still owing as aforesaid).

3. I verily believe that there is no defence to this action.

4. I am duly authorized by the plaintiff to make this affidavit (delete if sworn by plaintiff)

Sworn (or affirmed) as in Form 78

The learned Counsel for the defendants argued that:

(a) nowhere in the affidavits did the deponent concerned state positively that he has personal knowledge of the matter deposed to by him; alternatively, nor did he state the source of the information set out in the affidavits; and

(b) it was further pointed out that the deponent concerned did not state his address.

Encl. 7 is the affidavit of Lee Chin Keong affirmed on 13 February 1989. It is the first and main affidavit relied upon by the plaintiff to support this Order 14 application. Paragraphs 1 and 7 of this nine-paragraph affidavit state:

Affidavit

I, Lee Chin Kheong (NRIC No. 1409462) of full age do solemnly and sincerely affirm and say as follows:

1. I am the Attorney of the plaintiff abovenamed and am duly authorized to affirm and make this affidavit on their behalf.

.....

7. It is within my knowledge that the said debt was incurred and still due and owing as aforesaid.

Encl. 14 is the "further affidavit in reply" of Lee Chin Kheong (there is an "affidavit in reply" of Lee Chin Kheong, encl.13, affirmed on 27 September 1989, but this affidavit was not objected to by the learned Counsel) affirmed on 14 October, 1989. Paragraphs 1 and 2 of this five-paragraph affidavit state:

Further Affidavit In Reply

I, Lee Chin Kheong (NRIC No:1409462)of full age do solemnly affirm and say as follows:

1. I am the Attorney of the abovenamed Plaintiff and am duly authorized to make and affirm this affidavit on their behalf.

2. This affidavit is made in support of my affidavit in reply affirmed on 27 September 1989 filed herein.

Enclosure 15 is a "supplemental affidavit' affirmed by Lee Chin Kheong on 19 November 1989.This affidavit consists of seven paragraphs but for the purpose of the objection raised I need only to refer to paragraphs 1 and 2 of the affidavit. These paragraphs read:

Supplemental Affidavit

I, Lee Chin Khoong (NRIC No. 1409462) of full age do solemnly and sincerely affirm and say as follows:

1. I am the Attorney of the abovenamed plaintiff.

2. This affidavit is made not in derogation of but in support of my previous Affidavits filed herein.

Enclosure 43 is the "affidavit in rebuttal" of Awang Salleh bin Abdul Majid who affirmed as the Attorney of the plaintiff on 22 March 1994. Paragraphs 1 and 2 of this lengthy affidavit read:

Affidavit In Rebuttal

I, Awang Salleh bin Abdul Majid (NRIC. 2804118) of No. 1070-1071, Jalan Teluk Wanjah, 05200 Alor Setar, Kedah do solemnly and sincerely affirm and say as follows:

1. I am the attorney of the Plaintiff abovenamed and am duly authorized to make and affirm this affidavit on their behalf.

2. I crave leave to refer to the Supplemental Affidavit affirmed by Chew Kam Meng on the 18 February 1994 filed herein (hereinafter to be referred to as "the said affidavit").

As to contention (a) above, I am of the view that this criticism is not valid in respect of the affidavit in encl. 7 in view of paragraph 7 of that affidavit.However, I accept the validity of the criticism in respect of the other affidavits mentioned.

As to contention (b), this criticism is valid in respect of all the affidavits mentioned, except in respect of the affidavit in encl.43 (where the deponent did give his address). In this connection, I am also mindful of O. 41 r. 1(4) which requires the deponent of every affidavit to state his place of residence.

The issue before me, as I see it, is whether, it is justified for me to reject all these affidavits purely on the grounds of the defects as pointed out in (a) and (b) above by learned Counsel for the defendants? I have given much thought to this matter. Although I view with concern and do not condone any laxity as to compliance with the rules of procedure regarding affidavits and do not wish to be complacent on such matters - and I hope my decision in this case would not be misconstrued as giving a "licence" to any solicitor to adopt a cavalier attitude in drafting affidavits yet, with respect to learned Counsel, after taking into account the peculiar circumstances of the present case, I do not think that it would be justified for me to reject enclosures 7, 14. 15 and 43. I hold that under the circumstances of the case, the defence, by their conduct, had waived their right to object to the defects. First, the defence, in opposing this Order 14 application have filed two affidavits. These affidavits are:

(1) Encl. 10, the affidavit of Chew Kam Meng, affirmed on 29th June, 1989;
(2) Encl. 40, the "supplemental affidavit" of Chew Kam Meng, affirmed on 18 February 1994.

There was, in fact, a third affidavit (encl. 44) - "affidavit in reply" of Chew Kam Soon affirmed on 8 April 1994 - filed by the defence on 13 April 1994. But this affidavit was objected to by learned Counsel for the plaintiff because of short service, and the objection was upheld. Now, although many objections and points of law were raised in the defendants' affidavits (especially in encl. 40), yet, remarkably, in none of these affidavits (even including encl. 44, which I rejected)were the objections on points (a) and (b) above raised by the defence.The plaintiff has been filing several affidavits ever since 1989 for the purpose of the present application. There is, therefore, nothing new about these omissions in the plaintiff's affidavits. So, why raise the issue about these omissions now?

Secondly, the learned Counsel for the plaintiff had informed this Court that she had been taken by surprise: for the learned Counsel for the defendants never gave any prior notice to the plaintiff's solicitor of his intention to raise these issues.

In coming to this decision, I am guided by the decision of Edgar Joseph Jr. J.(as he then was) in *Jasabena Sdn. Bhd. v.Beh Heng Foo & Anor* [1985] 1 MLJ 394, at page 396:

> Moreover, the respondent in this case had clearly waived their right to take the preliminary objection by filling affidavits in opposition and failing to give to the applicant prior notice of their intention to raise the preliminary objection.
>
> I would therefore dismiss the preliminary objection. The hearing of this aplication must proceed on its merits.
>
> Before concluding, I have an observation to make, and it is this: Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his

opponent. This was unfortunate and I would echo the practice advocated by Thomson, C.J. in *Gurbachan Singh v. Seagrott & Campbell* that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.

I therefore dismiss this preliminary objection and order that the application be heard on its merits.